83-568

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ALEXANDER L. STEVAS,
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Plaintiff and Respondent,

vs.

THE OFFICES KNOWN AS 50 STATE DISTRIBUTING, CO.,
Defendant and Petitioner.

PETITION FOR WRIT OF CERTIORARI
to United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the search warrant in this case, authorizing the seizure of all records, files, trade inventory, cash on hand, and equipment of a mail order business, without limitation as to time or subject matter of the articles to be seized was supported by the probable cause set forth in the affidavit presented to the magistrate, reciting misrepresentations by seven employees over a one week period and further reciting prior experience of a postal inspector with unrelated businesses.

2. Whether the warrant which issued in this case, held by the Court of Appeals to delegate no discretion because it authorized seizure of the entire business, was a general warrant prohibited by Amendment IV to the Constitution of the United States.

3. Whether the Court of Appeals correctly reversed the District Judge's finding that a search lasting 12 hours, resulting in the seizure of multiple van-loads of records, personal effects, and office equipment, during which three hundred persons were detained, identified, and photographed, without and in

spite of requests for, counsel and which resulted in substantial physical damage to the premises, was such outrageous government conduct as to require return of all seized property.

PARTIES AND RELATED ACTION

Petitioner, The Offices Known as 50 State Distributing, Co., was the movant in the District Court for a pre-indictment, pre-filing order to return property seized by Postal Inspectors executing a search warrant on that business on October 20, 1981. Identified in the warrant as the subjects of this search were the following: THE OFFICES KNOWN AS 50 STATE DISTRIBUTING COMPANY, INC., AKA GLOBAL SPECIALTY DIST., DELTA DIST. CO., INC., PRESIDENTIAL DISTRIBUTING CO., FIDELITY DIST., ATLAS DISTRIBUTING, ROYAL DISTRIBUTING, PROFIT DEVELOPMENT, INTEGRITY DISTRIBUTING, TELEMARKETING WEST, CENTENNIAL DIST., AMERICAN SYNDICATED MKTG., NATIONWIDE DISTRIBUTORS, NATIONWIDE MTKG. CONCEPTS, NATIONWIDE MKTG. CONSULTANTS, 3034, 3044, 3052 and 3068 SOUTH HIGHLAND DRIVE, LAS VEGAS, COUNTY OF CLARK, STATE OF NEVADA, ALONG WITH AN ADJOINING TRAILER, LOCATED ON THE SOUTH SIDE OF PREMISES, INCLUDING ALL PERSONS PRESENT AT 3034, 3044, 3052 and 3068, AND TRAILER LOCATED ON THE SOUTH SIDE OF PREMISES.

In the District Court and in the Court of Appeals for the Ninth Circuit, Petitioner was

represented by attorney Oscar B. Goodman of Las Vegas, Nevada. Petitioner is represented here by Robert P. App, of Santa Ana, California, a member of the Bars of California, and of this Court, practicing law at 1502 N. Broadway, Santa Ana, California, 92706.

Plaintiff in the action below, Respondent here, is the United States of America and is represented by Lamond R. Mills, United States Attorney for the District of Nevada, and his assistant, Booker Evans, Esq., and Joel M. Gershowitz, for the Department of Justice, Washington, D.C..

Appeal from a District Court judgment denying, in a separate case, the relief granted by the District Court here was decided by memorandum opinion filed September 6, 1983, in the United States Court of Appeal for the Ninth Circuit (U.S. v. The Offices Known as H&S Specialities, No. 82-5826). The warrant in that case is virtually identical to that here, and was issued and executed as part of coordinated raids on three separate mail order businesses, including that at bar.

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No.

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA
Plaintiff and Respondent,
vs.
THE OFFICES KNOWN AS 50 STATE
DISTRIBUTING CO.
Defendant and Petitioner.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

OPINIONS BELOW

The unreported order, and Findings of Fact, Conclusions of Law, and Order for Return of Seized Property, filed in No. Civil-LV 81-799, RDF (D.Nev., Apr. 9 and Apr. 16, 1982, respectively), by the Honorable Roger D. Foley, are reproduced in the appendix as Exhibits A and B respectively.

The opinion of the Court of Appeals is reported at 708 F.2d 1371.

JURISDICTION

The opinion of the Court of Appeals was filed on May 25, 1983; a timely Petition for Rehearing was denied on July 6, 1983. The jurisdiction of this Court to issue a Writ of Certiorari is founded on 28 USC § 1254, and this Petition is filed within the time mandated by 28 USC § 2801 (c); see also, Supreme Court Rule 20.4.

CONSTITUTIONAL PROVISION INVOKED

Amendment IV to the Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searches, and the persons or things to be seized.

STATEMENT OF THE CASE

The affidavit in support of the warrant application alledged that one Mike Powell was an investigator from California, employed in September, 1981, by the Gillette Pen Co., to investigate complaints received by Gillette from

unnamed persons over the preceeding two months, concerning pens that they were to have received from ad specialty companies located in the Las Vegas area. Among the 100 complaints received by Gillette in those two months, some apparently involved 50 State Distributing.

Although Postal Inspectors were so advised by September 2, Gillette employed its own private investigator to infiltrate the company, and by September 14 he had secured a job, and began a one-week training course in phone sales. During that course, Powell was told that 50 State did not "mis-rep", use company names like Paper Mate, and that supervisors were supposed to look for mis-reps. Powell was told that a contest run by 50 State resulted in a "big" prize for one of 2000 customers, although a printed "pitch" supplied used the figure one of fourteen and in the next week Powell heard "5 or 6" telephone salesmen use this latter figure.

Powell also told Postal Inspectors that he was told that sales could be prompted by offering a customer a small free prize, for which--in reality--the salesman was charged $3.00. The salesmen were also instructed to tell customers

that if they couldn't buy a minimum order of 150 pens, that they could buy fewer and the extras would be used at trade shows. In reality, there were no trade shows.

Customers were not chosen initially by computer, Powell learned, but potential contacts were selected from yellow-page telephone books. Powell worked at 50 State for 8 days, and gave postal inspectors an apparently inclusive list of the "mis-reps" he heard during that time, attributed to various salesmen. Only six names surfaced: Danny Kurr, Brian Starr, Dave Nielsen (aka Curtis), Jan Gelfand (aka Carter), Tom Plunkett (aka Thomas), and Dave Johnson. In addition, a supervisor identified as "Al" repeated the "trade show" pitch.

Complaints from customers were solicited by postal inspectors. A Mr. Gordon was not satisfied with the quality of pens shipped to him, which were represented to have been made by "the Parker Corporation." The trade show pitch was not made. The knives, received as the free prize, were not Sheffield of England as represented.

A Mr. Bean reported that he had first bought goods from 50 State in early 1981 and was not satisfied, but upon being told that a

new work-force was in place, in September, 1981, he ordered more merchandise. He again felt "ripped-off" when he received the package which did not contain a genuine "Playboy" money clip.

A Mr. Green reported that he bought $140.00 of pens and money clips, and although told he was buying Schafer and Husky pens, received "worthless" pens.

A Dr. Caminno had spoken to Don Curtis, had been promised a prize of a Beta Max recorder, but had not received one. His complaint related not to the goods he bought, but to not receiving the recorder.

A Mr. Doschadis bought thirty-six pens "worth more than $5.00 each", for $200.00. He actually received Flair pens worth about one dollar each, and did not receive a bottle of perfume he had been promised.

A Mr. Ragsdale also bought from 50 State on two occasions, the first, pens which were over-priced, and the second, key rings "which were also not as expected." He was also promised a tractor or a VCR recorder, a $1300.00 diamond, and "an expensive Playboy money clip." He only received "a piece of junk", allegedly made in Hong Kong.

Mr. Campbell refused to order any pens at all, but agreed to accept a sample package. When a $160.00 C.O.D. package arrived, he refused delivery, but when later contacted, agreed to accept the pens at half-price. When received, they were over-priced, did not include his phone number as guaranteed and he received only one of several promised gifts.

Mr. Tech (of Chicago, Illinois), bought calendars which, on delivery, were not as promised, and did not receive a free vacation package to Las Vegas.

Mrs. Breasche ordered, but refused to accept delivery until offered the pens at half price. She felt she was over-charged but only filed the complaint when a "Mr. Petrie, of Presidential Distributors", was obnoxious to her on the phone. Instead of a free trip to Las Vegas, she received a certificate requiring a sixty dollar registration fee.

Mrs. Schank ordered 150 pens, which were very cheap, and instead of a 1/3 carat diamond that would have to be insured, received a cracked uncut stone.

One of the above deliveries had occurred in early 1981 (Bean), one in June, 1981 (Tech), and one in August (Campbell). The remaining

deliveries were in September or early October, 1981, and were apparently based on wire transmitted conversations overheard by private investigator Powell. Powell also noted that the six named solicitors "consistantly" represent themselves to be "promotion managers" for American Pen and Plastics in Las Vegas, and saw two supervisors hear "pitches" but not reprimand any salesmen. "Powell advised that during the course of his employment, all experienced 50 State salesmen he observed misrepresented products and prizes." (Warrant application, paragraph 11; emphasis added.)

The remainder of the affidavit established that the money clips sold were not authorized by Playboy; that Hallmark cards and Sheffield Cutlery did not deal with 50 State Distributing, or any subsidiary company, and neither did Parker or, of course, Gillette. The affiant so far had established that six salesmen had misrepresented products during an eight day period, and that several supervisors had not been heard to correct any salesmen; ten customer complaints were itemized.

The affiant included:

"31. I have investigated similar patterns of conduct as described in

this affidavit for the past four years. I have also investigated other types of schemes for the past ten years. I have participated in ten business searches involving similar type schemes. It has been my experience that employees carry 'lead course' material in and out of these 'boiler rooms' in their briefcases, sacks, purses or on their person. In the past, they have attempted to conceal material damaging to themselves, on their person, or leave with this material when allowed to vacate the premises.

"32. It is my belief that 50-State Distributing Company, Inc., et al., 4033 South Highland Drive, Las Vegas, Nevada, 89102, is at the present time executing a scheme and artifice to defraud and to obtain money and property from businesses and various other organizations by means of false and fraudulent pretenses, to wit: that business owners have been selected by computer, and have won gifts such as diamonds, playboy money clips, etc., and may purchase high-quality name brand pens, calendars, etc.,

at low prices, and that the C.O.D. packages and returned U.S. Postal Money Orders to and from said businesses and organizations have been mailed or received by 50-State Distributing, et al., and that this scheme is being conducted by persons known and unknown on the premises described herein, wherein "pinks," lead source material, invoices, sales orders, order forms, books, records, ledgers, correspondence, pitches (written or taped), typewriters, premiums, gifts, supplies and/or merchandise, United States Postal Service Money Orders, United States Postal Service C.O.D. firm mailing records, and other evidence and instrumentalities of numerous on-going violations of Title 18, U.S. Code, Section 1341 (Mail Fraud), Title 18, United States Code, Section 1342 (Ficticious Names) and Title 18, United States Code, Section 371 (Conspiracy) are to be found."

On October 18, before issuance of any warrants, Postal Inspectors for three

simultaneous raids on three unrelated mail order businesses met, discussed the draft affidavits, and coordinated the plans for the raids the next day. After finalization of the plans, at 8 o'clock P.M., that night, the warrants were signed and execution began the next day. The progress of the raid, lasting from nine in the morning until nine that night, is set forth eloquently in the Findings of District Judge Foley (Appendix B), and more cursorily in the opinion of the Court of Appeals.

By order of April 7, 1982, after evidentiary hearing, the Honorable Roger Foley, United States District Judge, found that the warrant was a general warrant authorizing seizure far beyond the probable cause established in the affidavit, and also found that in the execution of the warrant that Postal Inspectors "ran roughshod" over the rights of 300 employees and officers of 50 State Distributing Company.

REASONS FOR GRANTING THE WRIT

I.

As long ago as Marron v. U.S., 275 U.S. 192 (1927), this Court recognized that the Fourth Amendment plainly forbade general searches,

requiring that warrants leave nothing to the discretion of the executing officer, because

> "The tendency of those who execute the criminal laws of this country to obtain conviction by means of unlawful seizures and enforced confessions. . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." Marron, supra, at 195-96, quoting from Weeks v. U.S., 232 U.S. 383, 391.

Nevertheless, even a seemingly broad warrant, containing catch-all language which could be read to further broaden the warrant, has, if supported by probable cause, survived constitutional challenge. Andresen v. Maryland, 427 U.S. 462 (1976); cf., Stanford v. Texas, 379 U.S. 476, 485 n. 16 (1965).

This Court has not, however, delineated what will constitute probable cause to justify a sweeping search such as that here; in Stanford probable cause was assumed, and the "generality" attack went rather to the delegation of authority

to the executing officers to determine what materials expressed ideas which were evidence of violations of law; Stanford thus "sounded" more in the First Amendment than the Fourth. Yet the Fourth Amendment underpinnings of Stanford are clearly directed at that exercise of discretion.

In Andresen, this Court reviewed a warrant which authorized a search for documents "involving Lot 13T in the Potomac Woods subdivision." The search, of two offices, resulted in the seizure of two to three percent of the files at one office, and less than five percent at the second office. (427 U.S. at 466-67.) The generality challenge was based on the inclusion of the phrase "together with other fruits, instrumentalities, and evidence of crime at this [time] unknown." (427 U.S. at 479.) The state court, and this Court, read that phrase as authorizing "seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T.'" (427 U.S. at 480.) This Court also rejected Andresen's complaint that an exhausive listing of documents in the warrant rendered the warrant "general"; the Court observed that:

> ". . .Under investigation was a complex real estate scheme whose existence could be proved only by piecing together many

bits of evidence. Like a jigsaw puzzle, the whole 'picture' of petitioner's false-pretense scheme with respect to Lot 13T could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little. The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession. The specificity with which the documents are named here contrasts sharply with the absence of particularity in Berger v. New York, 388 U.S. 41, 58-59, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967), where a state eavesdropping 'without requiring belief that any particular offense has been or is being committed; nor that the "property" sought, the conversations, be particularly described," was invalidated.'"

Nevertheless, in Andresen one particular transaction was the target of the search, and the kinds

of documents sought, though broad, were "particularized" by their relevance to Lot 13T.

In the case at bar, evidence of no one or several specified particular acts or transactions were targeted for the search. Rather, on the basis of minimal investigation, the business was declared fraudulent, and seizure of all of its records were authorized:

> "The warrant left the executing officers with no discretion. While the seizure was extraordinarily broad, and in that sense 'general', under the particular facts of this case the scope of the warrant was justified. It was not possible through more particular description to segregate those business records what would be evidence of fraud from those that would not, for the reason that there was probable cause to believe that fraud permeated the entire business operation of 50 State." 708 F.2d 1374.

Thus, though much broader than the warrant in Andresen, and precisely because so broad, without the discretion afforded in Stanford, the Court of Appeals upheld the warrant on the basis "that Gray's affidavit evidenced a pervasively fraudu-

lent operation which encompassed the entire business and therefore all business related books, records, and equipment constituted instrumentalities of fraud. . . ." (Ibid.) The Court of Appeals relied primarily, however, on the affiants belief of the pervasiveness of the fraud, based in turn on his experience with what he felt were similar businesses. (708 F.2d 1373.)

The warrant in this case could only be upheld by finding that it authorized seizure of all records. Its breadth was such that if any document were excluded from the ambit of the affidavit, the discretion remaining would have invalidated it. See, e.g., U.S. v. DeFalco, 509 F.Supp. 127 (S.D. Fla. 1981); U.S. v. Cardwell, 680 F.2d 75 (9th Cir. 1982), and cases cited therein.

Comparison of the cases relied on by the Court of Appeals with that at bar demonstrates the frailty of the warrant here: in U.S. v. Brien 617 F.2d 299 (1st Cir.) cert. denied, 446 U.S. 919 (1980), the affidavit enumerated two hundred and fifty complaints (617 F.2d 307), interviews with twenty former employees (617 F.2d 308), and a preliminary injunction against the business and the affidavits offered in support of that application. (617 F.2d 304-04.) The First Circuit held that

"where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized. . . ." (617 F.2d 309.) The question, of course, is whether the facts known in Brian, equate with those here.

Petitioner respectfully suggests that this warrant, to seize an entire business based on an undetermined number of unknown complaints from unknown parties to a third party (Gillette); on one week of "investigation" by a private investigator; on pitches made by six salesmen (compared to the 300 employees present when the warrant was executed); and on ten customer interviews, is merely an attempt by the Postal Service to define how little corroborating information for their "expert" opinions is necessary to close down a business. That is the stake in this case, and the question is whether a U.S. magistrate can issue such an order based on a Postal Inspector's opinion and minimal—given the size of the operation—corroborating information.

This Court should grant certiorari to define for bench, bar, and the Postal Service that limits which apply to that organization

in its application of this kind of presumption of fraud, and its ability not simply to find evidence of specific frauds, but to summarily shut down what it believes are offending businesses. Authority to so ruthlessly seize, on so little information, will render almost any business liable to summary governmental closure.[1/]

II.

If the probable cause set forth in the warrant application is not sufficient to establish grounds to seize the whole business, then the warrant becomes a classic general warrant as spoken of in Marron; where to search is clear, but what to seize is left to the complete discretion of law enforcement. See

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1/ A business noted for wide-spread advertising and vouching for its products, well-known for the same kind of high-pressure tactics as that demonstrated here, and subject to numerous complaints over the quality of its products and promises unfilled by its salesmen, is also well known to maintain detailed records concerning corporate decisions to short-change its customers by supplying inferior parts, or by knowingly incorporating dangerous engineering shortcuts in its products. Is General Motors subject to such a closure?

In re Lafayette Academy, 610 F.2d 1 (1st Cir., 1979) and U.S. v. Abrams, 615 F.2d 541 (1st Cir., 1980). In both of those cases, of course, the records to be sought were segregatable by their relationship to particular crimes, just—as here—the warrant could have been limited to those crimes defined by the affidavit. But warrants should also be limited as to time and what specific records are to be seized (Abrams, supra, 615 F.2d at 543); it should not require the executing officers "to make a legal distinction between fraudulent records and records that are not fraudulent. . . ." (Id. at 542, n.2.) If a specific listing of documents, or places they may be found (such as particular salesman's work stations) can be supplied, it must be. U.S. v. Cardwell, 650 F.2d. 75, supra; see also U.S. v. Cook, 657 F.2d 730 (5th Cir., 1981); VonderAhe v. Howland, 508 F.2d 364 (9th Cir., 1975).

Instead, in the case at bar, documents were sought based only on the affiant's experience that such a "boiler-room" operation would have them; documents were sought with no regard for their date of origin; documents were sought with no regard to subject matter, customer

identification, or salesmen involved. Predictably, in the execution of the warrant, documents were not segregated, but were seized en masse if they related at all to the business; magnetic recording tapes and tape recordings were seized within the complete discretion of the executing officers; toys for the employee Christmas party were seized because the officers did not know what they were; van-fulls of the business were seized based on a warrant which described no particular document.

It was this undefined breadth which led to the final claim here; that the execution of the warrant so shocked the conscience of the District Court as to invalidate all of the seizures.

III.

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous

offenses. . .' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', . . .or are 'implicit in the concept of ordered liberty'. . . ." Rochin v. California, 342 U.S. 165, 169 (1952).

On the morning of October 20, 1981--having the night before gotten ratification for their already-laid plans from a U.S. magistrate--forty armed postal inspectors and at least a half-dozen uniformed local officers gathered in a staging area near 50 State Distributing. The affiant and another agent entered 50 State, were taken to a customer service officer, and on being offered a chair were told "We don't have time, we have got 57 seconds to Mr. Richardson's [the general manager] office"; once there, the postal inspector threw "two pieces of paper" on his desk and announced that if the doors weren't opened, they'd be broken down; he then gave a

signal through a radio transmitter, and all forty-six officers entered all parts of the facility. Richardson was told to sit down and "make a Christmas tree" with his hands, and keep quiet. Three hundred people were on the premises; each was required to fill out an identification form before they would be allowed to leave; each was photographed. Some, with insufficient identification, were detained while local police agencies verified their identification.

Everyone was required to remain in specified areas, and could only go to the bathroom accompanied by a postal inspector. At various times weapons were displayed. One woman was frisked, after undressing, in a rest-room. Wallets and purses were searched. No one was permitted to call an attorney. All personnel were excluded around noon but until nine that night the seizures continued. One hundred-sixty thousand dollars in postal money orders, calculators, staple-guns, duplicating machines, family pictures, personal insurance papers and deeds, children's toys, blank stationary, envelopes, and insurance forms, blank tapes and tape recorders; whole filing cabinets were removed without any examination for relevancy. Two forty-foot vans, one half that size, and one

or two other vehicles had to be loaded with all of the material seized. One large automated filing system was broken when its files were being off-loaded en masse, and out of balance, the rotating system broke. One door--open when the inspectors entered--was relocked at their request and then broken down.

One inspector--on finding a computer--remarked that "at last we found a computer so they can't use it for a while." Another, finding office keys in a secretary's purse, noted, "You won't be opening up this office again." That prediction has proven true.

CONCLUSION

Firm in their belief that some crime had been committed, and based on a brief investigation by proxy and a miniscule sampling of dissatisfied customers, the United States Postal Service--with para-military precision--planned and executed this raid to close--in one day--the entire business of 50 State Distributing Co., under the aegis of a warrant apparently never so intended. While the Court of Appeal "saved" the warrant from attack by holding that it authorized seizure of all business records, it was not so simply framed; the magistrate authorized seizure

of more "particularized" items. Only by turning the particularity requirement upside-down did the Circuit save this search, and only by diluting the probable cause requirement to a solution barely detectible could this thus admittedly general warrant be upheld. In sum, the warrant averred that a few, of hundreds, of salesmen were making misrepresentations as to the quality of goods, and the nature of prizes; and that in fact a few, of thousands, of customers were dissatisfied with the "free" gifts they were to have received. On the basis of that corroboration of the affiant's belief, he was authorized to close it down without further ado, by armed force and accompanied by massive detentions. Such sweeping raids should not be sanctioned by this Court, and the Postal Service should not be confirmed in its belief that its opinion--virtually alone--will be ratified by the Courts of the United States to allow it to close on-going businesses. This Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

EXHIBIT A.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff-Respondent, vs. THE OFFICES KNOWN AS 50 STATE DISTRIBUTING COMPANY, INC., et al., Defendants-Movants.	Civil LV 81-799RDF ORDER GRANTING MOTION FOR RETURN OF SEIZED PROPERTY

A.

THE SEARCH WARRANT IS A GENERAL WARRANT

Although the Magistrate could have, from the affidavit of Wayne E. Gray, found probable cause to believe that plaintiff had been and was engaged in a conspiracy, a scheme, for obtaining money through the mails by means of false and fraudulent misrepresentations and promises, all

in violation of Title 18 U.S.C. § 1341, Mail Fraud, and although the United States Attorney could have drawn up, for the Magistrate's signature, a proper search warrant particularly describing those certain persons sought to be searched and those specific items of personal property sought to be seized, all from plaintiff's premises, that would furnish evidence of said mail fraud conspiracy and scheme, the inartfully drawn search warrant signed by the Magistrate fails to satisfy the requirements of particularity demanded by the Fourth Amendment and is on its face a general warrant. The motion for return of all seized property is granted as prayed for.

B.

THE SEARCH AND SEIZURE VIOLATED CONSTITUTIONAL RIGHTS

While this Court has little sympathy for those who perpetrate fraud upon the public, it must condemn the flagrant abuse of power demonstrated by postal inspectors in executing the search warrant. From the testimony taken April 5, 1982, it seems clear that the Government ran roughshod over the constitutional rights of the plaintiffs and of the employees. Perhaps this came about not so much because of ill will on the part of

the inspectors, but because of the difficulty presented to them in attempting to execute a general warrant.

Plaintiffs' counsel will prepare and submit to this Court within 10 days from the date hereof appropriate findings of fact, conclusions of law and order for return of seized property.

Dated: April 7th, 1982

/s/
DISTRICT JUDGE

APPENDIX

EXHIBIT B.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
THE OFFICES KNOWN AS 50 STATE DISTRIBUTING COMPANY, INC., et al.,
Defendants-Movants.

Civil-LV 81-799,RDF

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR RETURN OF SEIZED PROPERTY

This Court, upon considering the Motion for Return of Seized Property, filed by the Movant, THE OFFICES KNOWN AS 50 STATE DISTRIBUTING COMPANY, Inc., and having heard evidence in support thereof, and in opposition thereto, and having considered the legal memoranda submitted by said Movant and by Respondent, UNITED STATES OF AMERICA, and having heard and considered arguments pertaining to the same, hereby enters the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. That on October 19, 1981, the Honorable PHILIP M. PRO, United States Magistrate, issued a search warrant, authorizing the search and seizure of the premises located at 3034, 3044, 3052 and 3068 South Highland Drive, Las Vegas, Nevada, along with an adjoining trailer thereto, and all persons present therein, for certain property, namely, "lead source material, invoices, sales orders, order forms, books, records (magnetic or typewritten), ledgers, correspondence, pitches (written or taped), typewriters, premiums, gifts, supplies, and/or merchandise, United States Postal Service Money Orders, United States Postal Service C.O.D. firm mailing records, and other

evidence and insttumentalities for numerous on-going violations of Title 18, United States Code, sections 1341 (Mail Fraud), 1342 (Fictitious Names), and 371 (Conspiracy)."

2. That on October 19, 1981, representatives and agents of the United States Postal Inspection Service met at Nellis Air Force Base for the purpose of forming teams to conduct a search of the afore-referenced premises and persons. Some 43 agents were involved in the briefing process wherein the affidavit to the search warrant was discussed and a draft of the search warrant was reviewed.

3. At or about 9:00 A.M. on October 20, 1981, 43 United States Postal Service Agents entered the premises of 50 State Distributing Company. Representatives of the Las Vegas Metropolitan Police Department were stationed at ingress and egress access sources and the premises was secured. All persons on the premises, whether employees of 50 State Distributing Company or not, were ordered to be seated and more particularly, to remain behind their respective desks or in their respective work areas until they were processed. Over 300 employees of 50 State Distributing were on the premises, and at least two visitors were there as well. Before anyone was permitted to

leave the United States Postal Authority Inspection Agents required them to have their picture taken, in all cases with still photography, and in some cases with video taping, in all cases each person had to fill out an identification form in their own hand requiring them to disclose their name, address, phone number, sex and social security number; in many cases their personal wallet had to be inspected in order to verify identification, and in those cases where one did not have ready identification, an identification check was made to the Department of Motor Vehicles of the State of Nevada to ascertain whether there were any outstanding "warrants or wants". This identification process was conducted at pain of continued detention or arrest. In at least one instance, because an employee did not have identification, she was forced to undergo a "strip search". The employees were not even allowed to enter the restrooms without being accompanied by a U.S. Postal Inspection Agent.

4. After the identification process was completed, all employees and persons on the premises of 50 State Distributing Company were ordered to leave. From 12:00 Noon until the early evening hours a search and seizure of the

premises was conducted. Business and personal effects were taken and hauled away in massive vans, two of which being 60 and 40 feet in length, respectively. Multiple trips by the vans were made. Personal effects which had no relation to the business of 50 State Distributing Company were seized; monies, including foreign coins, were seized; all business records, without regard to the year and time of preparation were seized. An entire warehouse of documents were seized contained in over one hundred and eighty (180) large carton boxes of materials, with the only criteria used to determine whether the item was to be seized being a random checking of documentation by the Postal Authorities to ascertain whether the documents appeared to be "business related". Documents were seized without examination. A device referred to as a lectriever which contained files, was emptied, and in the process of being emptied of the files was irreparably damaged. A door to a record room which had been opened when the 50 State employees were on the premises prior to their being excluded was forcibly broken into and irreparably damaged. Items taken from the premises included blank tapes, blank stationery, tape recorders containing no tapes, toys which

had been purchased for an employee's children's Christmas party, family pictures from the walls of various offices, and other items which were of a personal and non-business nature.

Several employees requested the opportunity to call legal counsel when the United States Postal Inspectors entered the premises and were denied the opportunity to so do.

CONCLUSIONS OF LAW

It is concluded that although the Magistrate could have found probable cause to believe that Movants had been and were engaged in a conspiracy, a scheme for obtaining money through the mails by means of false and fraudulent misrepresentations, and although a proper search warrant could have been drawn up, wherein there would be a particular description of certain persons sought to be searched and specific items of personal property to be seized, such was not done in the instant matter. The inartfully drawn search warrant signed by the Magistrate fails to satisfy the requirements of particularity demanded by the Fourth Amendment of the United States Constitution and on its face is a general warrant.

In addition, the flagrant abuse of power demonstrated by Postal Inspectors in executing

the search warrant constituted a roughshod running by the Government over the Constitutional rights of the Movant and its employees and others.

O R D E R

IT IS HEREBY ORDERED that the Respondent, the UNITED STATE OF AMERICA, shall forthwith return all seized property taken from the premises of the Offices Known as 50 State Distributing Company, Inc., and the persons who were at said premises.

IT IS FURTHER ORDERED that all copies of the unlawfully seized documents be returned as well.

DATED this 15th day of April, 1982.

ROGER D. FOLEY
U.S. DISTRICT COURT JUDGE

Submitted By:
OSCAR B. GOODMAN, ESQ.

By_____
Attorney for Movant
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

APPEARANCE OF COUNSEL

AND

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, hereby enters his appearance in the within bound matter and certifies that his address for service of process is

ROBERT P. APP, ESQ.
Giles, Stewart, Barnett & Harmon
1502 N. Broadway
Santa Ana, CA 92706
714/544-4132

Undersigned counsel hereby certifies in accordance with Rule 28.5(b) that service of the within bound Petition for a Writ of Certiorari has been made upon all necessary parties by mailing copies thereof, in triplicate, this ___ day of October, 1983, first-class postage paid, on

LAMOND MILLS, U.S. ATTORNEY
BOOKER EVANS, ASST. U.S. ATTORNEY
Office of the U.S. Attorney
Box 16030
Las Vegas, Nevada 89101

and

JOEL GERSHOWITZ, ESQ.
United States Department of
Justice
Washington, D.C.

Signed,

ROBERT P. APP
Member, Bar of the
United States Supreme
Court

83-568

Office - Supreme Court, U.S.
FILED
OCT 22 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THE OFFICES KNOWN AS 50 STATE DISTRIBUTING CO., INC.,
Defendant and Petitioner,

vs.

UNITED STATES OF AMERICA,
Plaintiff and Respondent.

SUPPLEMENT APPENDIX TO PETITION FOR WRIT OF CERTIORARI

to United States Court of Appeals
for the Ninth Circuit

ROBERT P. APP
Counsel of Record
STEVEN L. HARMON
Attorneys at Law
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FILED
MAY 25 1982
PHILLIP B. WINBERRY
Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellant,	)	No. 82-5671
	)	
vs.	)	
	)	
THE OFFICES KNOWN AS 50 STATE DISTRIBUTING CO.,	)	
	)	
	)	
Appellee.	)	O P I N I O N

On Appeal from the United States District Court for the District of Nevada
Honorable Roger D. Foley, Presiding

Argued and Submitted: March 16, 1983

Before: MERRILL, CHOY and SNEED, Circuit Judges

MERRILL, Circuit Judge.

The United States appeals from the District Court's order granting a motion by Appellee 50 State Distributing Co., for the return of

improperly seized property, pursuant to Rule 41(e), F.R. Crim. P. The search in question was executed by agents of the United States Postal Service on October 19, 1981, pursuant to a warrant, and resulted in virtually all of 50 State's business records being seized.

FACTS

On October 19, 1981, following several weeks of investigation, the United States Postal Service obtained a warrant from a United States Magistrate authorizing the search of 50 State's place of business in Las Vegas, including "all persons" on the premises. The warrant authorized the seizure of certain property, as follows:

> lead source material, invoices, sales orders, order forms, books, records (magnetic or typewritten), ledgers, correspondence, pitches (written or

taped), typewriters, premiums, gifts, supplies, and/or merchandise, United States Postal Service Money Orders, United States Postal Service C.O.D. firm mailing records, and other evidence and instrumentalities for numerous on-going violations of Title 18, United States Code, Sections 1341 (Mail Fraud), 1342 (Fictitious Names) and 371 (Conspiracy).

The warrant was based on and incorporated the affidavit of Postal Inspector Wayne E. Gray. The affidavit described 50 State as a national supplier of advertising specialty products such as ball point or felt tip pens, key chains and calendars, all bearing the name and advertising message of the purchaser. It described 50 State's business as directed at small businesses nationwide and a "boiler room" sales operation which engaged in fraud and

misrepresentation in selling its promotional merchandise. Gray's affidavit was 27 pages in length and was based in part upon information supplied by a private investigator who gained employment for a time with 50 State; by brand name manufadturers that 50 State falsely claimed to represent; and by several victims of 50 State's fraudulent conduct.

According to the affidavit, the private investigator had been enrolled in a one-week training course where he had been instructed by an officer of 50 State in the techniques of successful selling of the company's merchandise. The private investigator had observed and overheard seven or more of the company's salesmen at work and reported in detail on his observations. He stated that it was the general practice of the salesmen to telephone prospective customers and inform them that they had been selected to receive a gift, such as a diamond, money clip,

steak knife set, perfume, or Betamax recorder. The salesman would then inform the prospect that in order to receive a free gift or to be eligible for another drawing he would have to purchase some of the advertising specialty products. The salesman would claim to have for sale brand name, high-quality merchandise which he would send to buyers through the mail C.O.D. The merchandise was in fact of shoddy quality and the gifts either did not materialize or were substantially worthless.

The affidavit contained the following statement:

> I have investigated similar patterns of conduct as described in this affidavit for the past four years. I have also investigated other types of schemes for the past ten years. I have participated in ten business searches involving similar type schemes. It has been my

experience that employees carry "lead source" material in and out of these "boiler rooms" in their briefcases, sacks, purses or on their person. In the past, they have attempted to conceal material damaging to themselves, on their person, or leave with this material when allowed to vacate the premises.

It concludes with affiant's statement of his opinion as follows:

It is my belief that 50-State Distributing Company, Inc., et al., 3044 South Highland Drive, Las Vegas, Nevada, 89102, is at the present time executing a scheme and artifice to defraud and to obtain money and property from businesses and various other organizations by means of false and fraudulent pretenses, to wit: that business owners have been selected by computer, and have won gifts such as

diamonds, playboy money clips, etc., and may purchase high-quality name brand pens, calendars, etc., at low prices, and that the C.O.D. packages and returned U.S. Postal Money Orders to and from said business and organizations have been mailed or received by 50-State Distributing et al, and that this scheme is being conducted by persons known and unknown on the premises described herein, wherein "pinks," lead source material, invoices, sales orders, order forms, books, records, ledgers, correspondence, pitches (written or taped), typewriters, premiums, gifts, supplies and/or merchandise, United States Postal Service Money Orders, United States Postal Service C.O.D. firm mailing records, and other evidence and instrumentalities of numerous ongoing violations of Title 18, U.S. Code, Section 1341 (Mail

Fraud), Title 18, United States Code, Section 1342 (Ficticious Names) and Title 18, United States Code, Section 371 (Conspiracy) are to be found.

At or about 9:00 a.m. on October 20, 1981, 43 agents of the Postal Service and several Las Vegas police officials entered the premises of 50 State and executed the search warrant. At least 300 employees of 50 State were present, plus at least two visitors. Local police officers helped secure the entrances and exits to the building. The Postal Inspectors required all persons to remain seated at their desks or in their respective work areas. No one was permitted to leave the premises or, without an escort, to go to the restroom.

The Inspectors required each person on the premises to fill out an identification form and that each person be photographed before the individual was permitted to leave. Those who

did not have proper identification were required to remain in a holding area until their identity could be checked with the Nevada Department of Motor Vehicles. One employee, Donna Hara, was told that failure to fill out the identification form could result in further detention or arrest. Some employees asked to telephone their attorneys, but the inspectors refused until the search was concluded. Another employee without proper identification, Margaret Campbell, was taken to the restroom by a female agent who searched her slip and brassiere (which search the District Court termed a "strip search".)

During the search the Postal Inspectors seized business items, such as tape recorders, tapes, merchandise, stationery, business forms, files, and envelopes, as well as some personal items, including family pictures, foreign coins, cash, personal papers, and Christmas toys for an employee Christmas party. Some quantities of

documents were seized after only spot checks as to their relevance. Materials were hauled away by vans. Also during the course of the search the door to the records room was broken down following several unsuccessful attempts to locate the key. The Inspectors also damaged 50 State's Lektriever, an automatic filing machine.

On motion by 50 State under Rule 41(e), F.R. Crim. P., the District Court on April 7, 1982, ordered the government to return the seized property, concluding that the search warrant was a "general warrant" which failed to satisfy the Fourth Amendment's requirement of particularity as to the items to be seized and the persons to be searched, and that the execution of the warrant was unconstitutional in that the Inspectors ran "rough-shod" over the constitutional rights of 50 State and some of its employees.

The government has taken this appeal.

VALIDITY OF THE WARRANT

The Fourth Amendment requires that for a warrant to be valid, it must "particularly describ[e] the place to be searched, and the persons or things to be seized." This particularity requirement makes "general searches under [a warrant] impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927); see Andresen v. Maryland, 427 U.S. 463, 480 (1976); United States v. Williams, 687 F.2d 290, 292 (9th Cir. 1982); United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982); United States v. Hillyard, 677 F.2d 1336, 1339 (9th Cir. 1982).

In this case the government argues that the search warrant met the particularity requirement. It argues, first, that the warrant sufficiently removed discretion from the executing officers in that the warrant essentially authorized the seizure of all the business-related books, records, equipment and merchandise on Appellee's premises. Second, it argues that the breadth of the warrant was justified by the breadth of probable cause in view of Inspector Gray's affidavit. It argues that Gray's affidavit evidenced a pervasively fraudulent operation which encompassed the entire business and therefore all business-related books, records, and equipment constituted instrumentalities of fraud which the Inspectors were properly directed to seize.

We agree. The warrant left the executing officers with no discretion. While the seizure was extraordinarily broad, and in that sense

"general", under the particular facts of this case the scope of the warrant was justified. It was not possible through more particular description to segregate those business records that would be evidence of fraud from those that would not, for the reason that there was probable cause to believe that fraud permeated the entire business operation of 50 State.

In United States v. Brien, 617 F.2d 299 (1st Cir.), cert. denied, 446 U.S. 919 (1980), the court upheld a search under a broad warrant of the premises of a company believed to be engaged in the fraudulent sale of commodities options. The court noted that although various government agencies had received 250 complaints from the commodities business contacts, the government's probable cause was not limited to evidence as to those complaints, because it could be fairly inferred that the 250 complaints were just "the tip of the iceberg". Id. at 308.

The court concluded that the facts presented to the magistrate indicated that the commodities operation was entirely a scheme to defraud. Id. The court distinguished those cases where the suspected crime may have been evidenced in segregable records, id., at 309 n.11, and held that "where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized, if they are, as here, accurately described so that the executing officers have no need to exercise their own judgment as to what should be seized." Id. at 309 (emphasis supplied). See also United States v. Cortellesso, 601 F.2d 28, 32 (1st Cir. 1979) (facts in affidavit supported warrant in generic terms where facts indicated that stolen goods constituted dominant part of goods on searched premises), cert. denied 444 U.S. 1072 (1980); United States v. White, 541 F.Supp. 1181, 1186 n.2 (N.D. Ill. 1982) (dicta).

In National City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2d Cir. 1980), the court noted that because "there was probable cause to believe that NCTC's business was permeated with fraud. . . .the agents could properly seize all of the business records of NCTC described in the warrant".

The cases upon which 50 States relies are distinguishable. In those cases, although the courts struck down a warrant as an impermissible general warrant, the warrant allowed widespread seizure of business records while the suspected wrongdoing supporting the warrant pertained only to small segments of the operations of the searched business. In those cases the evidence of fraud was segregable. United States v. Abrams, 615 F.2d 541 (1st Cir. 1980); United States v. Roche, 614 F.2d 6 (1st Cir. 1980); Application of Lafayette Academy, 610 F.2d 1 (1st Cir. 1979). Nor is our decision inconsistent

with United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982), in which we invalidated a warrant directing the authorities to seize "corporate books and records. . .which are the fruits and instrumentalities, of violations of 26 U.S.C. § 7201." Id. at 76. Because the only limitation in the Cardwell warrant on the search was that the seized items be evidence of the tax evasion statute, we held the seizure invalid. In Cardwell, however, the government's investigation had already focused on certain parts of the defendant's business records. Id. at 78. In this case, however, no such focused search was possible because the affidavit indicated that the entire 50 State operation was fraudulent.

As to the search of persons as well as premises, the affidavit provided probable cause to believe that evidence that 50 State was guilty of crime was to be found concealed on the persons of employees present at the premises

to be searched. No individual employee, however, was named or singled out for search. The affidavit makes no effort to show probable cause that any particular individual was in possession of evidence. The theory on which the agents proceeded apparently was that there was probable cause to suppose, because of the nature of their employment, that every person on the premises was an employee and might be in possession of evidence. Inspector Gray noted in the affidavit that, in his experience, "boiler-room" employees often conceal evidence on their persons. In our view, the affidavit falls short of supporting the assumption that all the employees may have been in possession of evidence. It may be argued that under these circumstances evidence obtained from a search of individuals is subject to suppression. The government contends, however, that a warrant to search persons identified only by their location

at a specific location is unobjectionable so long as there is probable cause to believe that anyone present might have on his person an item that is an object of the search. See Ybarra v. Illinois, 444 U.S. 85, 90 n.2, 92 n.4 (1979). This issue (together with the question of standing to raise it) we do not reach for the reason that it is not the issue before us. The issue before us is whether, by its scope, the warrant was invalid as a general warrant rendering all that was seized under the warrant subject to return. If probable cause was lacking as to the search of individuals, that does not operate to render the warrant itself invalid in its entirety as a general warrant. The remedy is not a return of all items seized but selective suppression or return of the items improperly seized. Cf. United States v. Cardwell, 680 F.2d 75, 78-79 (9th Cir. 1982) (approving partial suppression remedy as to improper warrant);

see also Andresen v. Maryland, 427 U.S. at 482 n.11.

We conclude that the warrant was not invalid as a general warrant and that the seizure was not rendered invalid by virtue of its scope.

VALIDITY OF THE EXECUTION OF THE WARRANT

Here we are concerned not with the scope of the warrant or seizure but with the manner in which the warrant was executed and the seizure carried out. The District Court in its order stated that "it seems clear that the government ran roughshod over the constitutional rights of the plaintiffs and of the employees."

The Court did not specify any act as a civil rights violation nor has there been any attempt by 50 State to assert standing on its part to complain of any particular intrusion on the privacy of its employees or to connect any particular violation with evidence obtained by

virtue of that violation. The contention of 50 State appears to be that the manner of execution of the warrant in its entirety was so offensive as to render the whole of the search and seizure unreasonable under the Fourth Amendment.

No authority is cited for this proposition nor is any standard suggested for determining when its application is proper. There may be justification for such a rule in extreme cases where there is no apparent justification for oppressive conduct. Cf. Rochin v. California, 342 U.S. 165 (1952) (outrageous conduct by law enforcement agents in ordering a stomach pump "shock[ed] the conscience" and justified setting aside conviction on due process grounds); Leiterman v. Rushen, Nos. 82-5088, 5089, slip op. 1638, 1639 (9th Cir. April 19, 1983) (dicta) ("outrageous and shocking conduct by law enforcement agents might so infect a conviction

with deprivation of constitutional rights that the conviction will be set aside on due process grounds" but conduct must be causally related to conviction; no such connection found). We do not find this to be such a case.

The breadth of the warrant (which we have held to be justified) rendered the execution of the warrant a most difficult task at best. Some control over the 300 50-State employees was necessary for an orderly search. If some seized items were not business-connected, if some property damage resulted, if some persons suffered unnecessary humiliation, a remedy in each instance is available, specifically designed to meet the specific offense. Considering the magnitude of the task, we cannot, from what we find in the Record, regard the search and seizure as so unduly oppressive or executed with such undue disregard of personal amenity as to shock the judicial conscience and

render the search invalid in its entirety.

We conclude that the manner of the execution of the warrant does not render the seizure invalid.

REVERSED AND REMANDED with directions that the Order of April 7, 1982, be vacated and set aside.

///

DOCKETED
FILED
July 06, 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 82-5671
	)	
Appellant,	)	USDC No. CV-LV-81-799
	)	(District of Nevada)
vs.	)	
	)	
THE OFFICES KNOWN AS 50	)	
STATE DISTRIBUTING CO.,	)	ORDER
	)	
Appellee.	)	
	)	

Before: MERRILL, CHOY and SNEED, Circuit Judges

MERRILL, Circuit Judge:

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Choy and Sneed have voted to reject the suggestion for rehearing en banc. Judge Merrill has recommended that the suggestion be rejected.

The full court has been advised of the

suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

July 5, 1983

MEMORANDUM TO CLERK OF COURT WINBERRY

FROM: JUDGE MERRILL

RE: U.S.A. v. Offices Known as 50 State Distributing Co.
No. 82-5671

Petition for Rehearing

I certify that Judges Choy and Sneed concur in the attached Order in the above-entitled matter. Please file it.

/s/ Charles M. Merrill
United States Circuit Judge

Att. (Orig. & 7 copies)

cc: Judge Choy
Judge Sneed

RULE 28.1 CERTIFICATION

Counsel is informed that 50 State Distributing Co., Inc., Petitioner here, and sole moving party in the courts below, is a corporation formed under the laws of the State of Nevada, which shares no common community of ownership with any other company or corporation, but which shares a common community of business interests with those companies identified in the search warrant application, as set forth at page iii of the Petition for Writ of Certiorari.

SUPPLEMENTAL CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, hereby certifies in accordance with Rule 28.5(b) that service of a Petition for a Writ of Certiorari in the United States Court of Appeals for the Ninth Circuit in U.S.A. vs. The Offices Known as 50 State Distributing Co., Inc., has been made upon the Solicitor General of the United States by mailing copies thereof, in triplicate, this ___ day of October, 1983, first-class postage paid, to:

REX E. LEE, Solicitor General of
the United States of America
Tenth and Pennsylvania Avenues
Northwest
Washington, D.C. 20530

Signed,

ROBERT P. APP, Member
Bar of the United
States Supreme Court

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies in accordance with Rule 28.5(b) that service of the within bound Supplemental Appendix to Petition for a Writ of Certiorari has been made upon all necessary parties by mailing copies thereof, in triplicate, this ____ day of October, 1983, first-class postage paid, on

LAMOND MILLS, U.S. ATTORNEY
BOOKER EVANS, ASST. U.S. ATTORNEY
Office of the U.S. Attorney
Box 16030
Las Vegas, Nevada 89101

and

JOEL GERSHOWITZ, ESQ.
United States Department of
Justice
Washington, D. C.

and

REX E. LEE, ESQ.
Solicitor General of the
United States
10th & Pennsylvania, N.W.,
Room 5143
Washington, D. C. 20530

Signed,

ROBERT P. APP
Member, Bar of the
United States Supreme
Court

FILED
JAN 23 1984

No. 83-568

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE OFFICES KNOWN AS 50 STATE DISTRIBUTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the search warrant for petitioner's business premises was unconstitutionally overbroad in that it authorized the seizure of all business-related documents.

2. Whether petitioner is entitled to return of all the property seized because of the allegedly unconstitutional manner in which postal inspectors executed the warrant.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-568

THE OFFICES KNOWN AS 50 STATE DISTRIBUTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App. 1-22) is reported at 708 F.2d 1371. The opinion and order of the district court (Pet. App. A2-A12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1983. A petition for rehearing was denied on July 6, 1983 (Pet. Supp. App. 23-24). The petition for a writ of certiorari was filed on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 19, 1981, agents of the United States Postal Service, armed with a search warrant, conducted a search of petitioner's business premises and seized numerous business records and other items. Thereafter, petitioner moved

the United States District Court for the District of Nevada for return of the seized property, pursuant to Fed. R. Crim. P. 41(e). The district court granted the motion (Pet. App. A6-A12). The court of appeals reversed (Pet. Supp. App. 1-22).

1. On October 19, 1981, following several weeks of investigation, the United States Postal Service obtained a warrant authorizing the search of petitioner's place of business in Las Vegas, as well as "all persons" on the premises. The warrant authorized seizure of the following property (Pet. Supp. App. 2-3):

> lead source material, invoices, sales orders, order forms, books, records (magnetic or typewritten), ledgers, correspondence, pitches (written or taped), typewriters, premiums, gifts, supplies, and/or merchandise, United States Postal Service Money Orders, United States Postal Service C.O.D. firm mailing records and other evidence and instrumentalities for numerous ongoing violations of Title 18, United States Code, Sections 1341 (Mail Fraud), 1342 (Fictitious Names) and 371 (Conspiracy).

Postal authorities executed the search warrant on October 20, 1981, and seized extensive business records and other items.

The warrant was based on and incorporated the affidavit of Postal Inspector Wayne E. Gray. The affidavit described petitioner as a national supplier of advertising specialty products such as pens, key chains, and calendars, all bearing the name and advertising message of the purchaser. It described petitioner's business as a "boiler room" sales operation that engaged in fraud and misrepresentation in selling its promotional merchandise to small businesses on a nationwide basis. Gray's affidavit rested in large part on information supplied by a private investigator who gained

employment with petitioner, by brand name manufacturers that petitioner falsely claimed to represent, and by several victims of petitioner's fraudulent conduct. Pet. Supp. App. 3-4.

According to the affidavit (see Pet. Supp. App. 4-5; Ex. R. 9-16),[1] the private investigator had observed or overheard seven or more of petitioner's salesmen at work and found that it was the general practice of the salesmen, with the knowledge of their supervisors, to telephone prospective customers and inform them that they had been selected to receive a gift (such as a diamond, money clip, steak knife set, perfume, or Betamax recorder). The salesmen would then inform the prospect that in order to receive the free gift or to be eligible for another drawing he would have to purchase some of the advertising specialty products. The salesmen would claim to have for sale brand name, high quality merchandise, which they would send to buyers through the mail C.O.D. The merchandise was in fact of shoddy quality, and the gifts did not materialize or were substantially worthless. In addition, the affidavit described in detail 10 separate fraudulent transactions engaged in by petitioner (Ex. R. 18-26).

2. On December 22, 1981, petitioner moved the district court for return of the seized property, pursuant to Fed. R. Crim. P. 41(e). In support of the motion, petitioner argued that the search warrant was insufficiently particularized with respect to the items to be seized and persons to be searched, that it was unsupported by probable cause, and that it was executed in an unconstitutional manner. A hearing on the motion ensued.

The evidence adduced at the hearing is summarized in the opinion of the court of appeals (Pet. Supp. App. 8-10). It showed that at about 9:00 a.m. on October 20, 1981, 43

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[1] "Ex. R." refers to the Excerpt of Record in the court of appeals.

agents of the Postal Service and several Las Vegas police officers entered the premises of petitioner to execute the search warrant. At least 300 employees of petitioner and at least two visitors were present. Local police officers helped secure the entrances and exits to the building. The postal inspectors required all persons to remain seated at their desks or in their respective work areas. They did not permit anyone to leave the premises or to go to the restroom without an escort (*id.* at 8).

The inspectors required each person on the premises to fill out an identification form and to be photographed before leaving. They required those who did not have proper identification to remain in a holding area until their identity could be checked with the Nevada Department of Motor Vehicles. One employee, Donna Hara, was told that failure to fill out the identification form could result in further detention or arrest. Some employees asked to telephone their attorneys, but the inspectors did not permit them to do so until the search was concluded. Another employee without proper identification, Margaret Campbell, was taken to the restroom by a female agent who searched her slip and brassiere. Pet. Supp. App. 8-9.

During the search the postal inspectors seized business items, such as tape recorders, tapes, merchandise, stationery, business forms, files, and envelopes, as well as some personal items, including family pictures, foreign coins, cash, personal papers, and Christmas toys for an employee Christmas party. Some quantities of documents were seized after only spot checks as to their relevance. Materials were hauled away by vans. Also during the course of the search the inspectors broke down the door to the records room following several unsuccessful attempts to locate the key. The inspectors also damaged petitioner's Lektriever, an automatic filing machine. Pet. Supp. App. 9-10.

The district court granted petitioner's Rule 41(e) motion and ordered the government to return all the seized property. The court concluded that there was probable cause to believe that petitioner was engaged in a scheme to obtain money through the mail by fraud, but held that the search warrant authorizing the search of the premises failed to satisfy the Fourth Amendment requirement of particularity with respect to the items to be seized and the persons to be searched (Pet. App. A11). In addition, the court concluded that the inspectors' execution of the warrant "constituted a roughshod running by the Government over the Constitutional rights of [petitioner] and its employees and others" (*id.* at A12).

3. The court of appeals reversed (Pet. Supp. App. 1-22). The court held that "[w]hile the seizure was extraordinarily broad, and in that sense 'general,' under the particular facts of this case the scope of the warrant was justified" (*id.* at 12-13). The court explained that "[i]t was not possible through more particular description to segregate those business records that would be evidence of fraud from those that would not, for the reason that there was probable cause to believe that fraud permeated the entire business operation of [petitioner]" (*id.* at 13).[2]

Finally, the court rejected petitioner's claim that the manner in which the warrant was executed invalidated the entire search. The court stated (Pet. Supp. App. 21-22):

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[2]The court noted that the issue of the validity of the warrant provision authorizing the search of "all persons" on the premises was not before it. The court explained, however, that if probable cause to conduct such a search were lacking, it would not convert the warrant into an impermissible general warrant. "The remedy is not a return of all items seized but selective suppression or return of the items improperly seized" (Pet. Supp. App. 18).

> The breadth of the warrant (which we have held to be justified) rendered the execution of the warrant a most difficult task at best. Some control over the 300 * * * employees was necessary for an orderly search. If some seized items were not business-connected, if some property damage resulted, if some persons suffered unnecessary humiliation, a remedy in each instance is available, specifically designed to meet the specific offense. Considering the magnitude of the task, we cannot, from what we find in the Record, regard the search and seizure as so unduly oppressive or executed with such undue disregard of personal amenity as to shock the judicial conscience and render the search invalid in its entirety.[3]

ARGUMENT

1. Petitioner contends (Pet. 10-19) that the search warrant for its place of business was unconstitutionally overbroad insofar as it authorized the seizure of all business-related documents. Petitioner does not dispute the general principle that "where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized * * *." *United States* v. *Brien*, 617 F.2d 299, 309 (1st Cir.), cert. denied, 446 U.S. 919 (1980). See also 2 W. LaFave, *Search and Seizure* § 4.6 n.62 (Supp. 1983) (generalized description of all documents of corporate defendant permissible "if there is probable cause that virtually all the records of the business are evidence or instrumentalities").[4] Rather, it is petitioner's

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[3]An indictment has not yet been returned in this case. It is expected that the matter will be presented to a grand jury before the end of March.

[4]Cf. *Andresen* v. *Maryland*, 427 U.S. 463, 481 n.10 (1976) (far-reaching warrant not impermissibly general where fraudulent scheme "could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little").

argument that the breadth of the authorization to seize documents was unsupported by the probable cause showing underlying the warrant. This fact-bound contention does not warrant this Court's review. In any event, it is without merit.

Postal Inspector Gray's affidavit in support of the search warrant, in addition to describing in detail 10 separate incidents in which petitioner defrauded its clients (Ex. R. 18-26), established through information obtained by an undercover investigator who obtained employment with petitioner that it was the *general practice* of several of petitioner's salesmen, with the knowledge of their supervisors, to misrepresent the company's merchandise and gifts to prospective customers (*id.* at 9-16; Pet. Supp. App. 4-5). Gray's affidavit strongly supported the inference that it was "more likely than not that [petitioner] was using similar, if not identical, fraudulent, deceptive and misleading sales techniques and business practices with most of its customers" and that the incidents related in the affidavit were "only the tip of the iceberg." See *United States* v. *Brien*, 617 F.2d at 308. Petitioner apparently argues (see Pet. 16-17) that the search authorization should have been limited to evidence relating to the particular fraudulent transactions enumerated in the affidavit and to the customers, salesmen, and merchandise involved in those transactions. But the affidavit established probable cause to believe that petitioner's fraudulent conduct was pervasive and ongoing, and therefore there was no reason for the warrant to be circumscribed in the manner suggested.[5]

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[5]The cases upon which petitioner relies (Pet. 18) are inapposite. For example, in *United States* v. *Abrams*, 615 F.2d 541 (1st Cir. 1980), the court struck down a search warrant that authorized the seizure of extensive records from the office of a doctor suspected of Medicare fraud because the warrant was not restricted to records of Medicare or Medicaid patients. Similarly, in *In re Lafayette Academy, Inc.*, 610

2. Petitioner also contends (Pet. 19-22) that it is entitled to return of *all* of the seized property because of the allegedly unconstitutional manner in which the postal inspectors executed the warrant. It appears that petitioner objects to the following actions: briefly detaining individuals on the premises for identification purposes; requiring individuals to remain in specified areas and not to go to the restroom unescorted; refusing to allow the individuals to contact attorneys while the search was in progress; searching the person of one employee; seizing certain items allegedly outside the scope of the warrant; breaking into the records room; damaging petitioner's Lektriever; and allegedly displaying weapons.

a. First and foremost, petitioner makes no attempt to connect any of these actions (except the seizure of items outside the scope of the warrant) with the evidence sought to be returned. Rather, it appears to be petitioner's theory that the manner of execution of the warrant was so offensive as to render all the property taken "illegally seized" within the meaning of Rule 41(e). Petitioner cites no authority for this novel proposition. To the contrary, it is well established that evidence seized pursuant to a warrant search is not rendered "unlawfully seized" simply because another aspect of the search is unlawful. See, *e.g.*, *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); see also *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). And,

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F.2d 1 (1st Cir. 1979), the court ruled that the warrant was defective because Lafayette was suspected of irregularities only in the administration of federally insured student loans, yet the warrant was not limited to records of such loans. Thus, in both cases, unlike here, the evidence of fraud was readily segregable from other property. Indeed, the First Circuit has explicitly recognized that where probable cause exists to suspect a pervasive scheme to defraud, all of the business records of the enterprise may be seized. See *United States* v. *Hershenow*, 680 F.2d 847, 851-853 (1982); *United States* v. *Brien*, 617 F.2d at 309.

of course, a court has no roving commission to depart from established rules of Fourth Amendment jurisprudence in order to punish a perceived violation. See generally *United States* v. *Payner*, 447 U.S. 727 (1980).

As the court of appeals explained (Pet. Supp. App. 21-22), even if there were some basis for the specific allegations made by petitioner, they provide no basis for return of the property properly seized pursuant to a valid warrant. If individuals were illegally searched or detained (an allegation that petitioner has no standing to raise), they have remedies, including the suppression of fruits of those illegalities; similarly, if property was unlawfully destroyed, there is a specific remedy appropriate to the violation. But the allegation that a constitutional violation has occurred provides no basis for invalidating the lawful seizure of evidence untainted by the violation. See *United States* v. *Crews*, 445 U.S. 463, 471 (1980); *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).

b. In any event, there is no merit to petitioner's allegations that the execution of the search warrant constituted "outrageous government conduct" (Pet. ii). The detention of individuals on the premises, which clearly did not affect petitioner's rights at all nor contribute to the seizure of the property in question, was a justifiable incident of the execution of the warrant. First, the warrant authorized the search of everyone found on the premises (cf. *Ybarra* v. *Illinois*, 444 U.S. 85, 90 n.2 (1979)), and this necessarily contemplated the brief detention necessary to conduct the searches and identify the persons. Moreover, apart from actually searching the individuals, the limited detention was necessary to facilitate an orderly search of the premises by having individuals available to provide keys or to advise the inspectors of the location of seizable property. A warrant to search premises "implicitly carries with it the limited

authority to detain the occupants of the premises while a proper search is conducted." *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981) (footnote omitted).

By the same token, requiring people to remain at their work stations and escorting them to the restrooms was plainly appropriate to prevent disruption of the search and the disposal of evidence. And refusing to allow them to contact their attorneys casts no cloud on the validity of the search. No individual was placed under arrest during the search, and hence there plainly was no violation of anyone's constitutional right to counsel. See *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion); *United States* v. *Timpani*, 665 F.2d 1, 3 (1st Cir. 1981). And, because the search was not conducted pursuant to consent, there is no way in which the failure of individuals to consult with counsel can be said to have led to the discovery of evidence, or, indeed, to have affected the rights of petitioner at all.

To the extent that some items were seized that were beyond the scope of the warrant, those items are subject to return; indeed, the government has returned those personal items that were inadvertently seized. As the court of appeals found, those seizures plainly do not evidence such outrageous government misconduct that the entire search should be declared illegal. Similarly, the fact that the inspectors were armed does not render the search illegal. They certainly had the right to take this precaution, and nothing in the record suggests that they even drew their weapons at any time.

Nor does the record support petitioner's allegations of unreasonable property damage. While it is true that the postal inspectors broke down the door to petitioner's records room, that action was not taken until the inspectors had given petitioner's employees an opportunity to produce the key to the room, and they had failed to do so (Tr.

115-116).[6] With respect to the Lektriever, the evidence showed that the damage occurred accidentally when the machine became unbalanced as the inspectors were emptying it (Tr. 116-117). Indeed, the inspectors attempted to repair the machine (Tr. 27-28).

In sum, the court of appeals correctly concluded (Pet. Supp. App. 21-22) that the search and seizure was not "so unduly oppressive or executed with such undue disregard of personal amenity" as to render the search illegal in its entirety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]It is true that the door had initially been locked at the inspectors' request when they first entered the premises. At that point, however, the inspectors were not yet prepared to search the room, and presumably they ordered it locked to prevent the removal of records.

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